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A BINDING TREATY ON CORPORATE RESPONSABILITY: A GLOBAL SOLUTION TO ADDRESS THE PROBLEM OF CORPORATE IMPUNITY – LESSONS LEARNED FROM AGUINDA VS CHEVRON

UM TRATADO VINCULANTE SOBRE RESPONSABILIDADE CORPORATIVA: UMA SOLUÇÃO GLOBAL PARA O PROBLEMA DA IMPUNIDADE CORPORATIVA – LIÇÕES APRENDIDAS A PARTIR DE AGUINDA VS CHEVRON

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Abstract
Extractive transnational corporations (ETC) can cause environmental harm and commit human rights (HHRRs) abuses in developing countries (DC). However, holding them accountable can become a real issue for their victims. There are different cases to reflect on this problem, but the one facing Ecuadorian communities against Chevron Corporation over oil pollution and HHRRs violations it's turning twenty-four years old, bringing us important lessons on corporate impunity. After reviewing the way this case has developed, it becomes clear that states, international organizations, and civil society involvement is necessary; that corporate responsibility should be regulated at all levels (national and international); and that durable coalitions' support from civil society organizations is fundamental to address the problem of ETCs causing environmental harm and committing HHRRs abuses in DC.

Keywords
Environmental justice. Binding obligations. International Treaty. Corporate responsibility. Human rights.

Resumo
As corporações transnacionais extrativas (ETC) podem causar danos ambientais e cometer violações de direitos humanos (HHRRs) em países em desenvolvimento (DC). No entanto, responsabilizá-las pode se tornar uma real dificuldade para as vítimas. Existem diferentes casos para refletir sobre esse problema, mas o que enfrenta as comunidades equatorianas contra a Chevron Corporation em relação à poluição por hidrocarbonetos e às violações de direitos humanos (HHRRs) está fazendo vinte e quatro anos, trazendo-nos importantes lições sobre a impunidade das empresas. Depois de analisar a forma como esse caso se desenvolveu, fica claro que o envolvimento dos Estados, das organizações internacionais e da sociedade civil são necessários; que a responsabilidade corporativa deve ser regulada em todos os níveis (nacional e internacional); e que o apoio durável das coalizões das organizações da sociedade civil é fundamental para abordar o problema das corporações transnacionais extrativas (ETCs) causando danos ambientais e cometendo abusos de direitos humanos (HHRRs) em países em desenvolvimento.

Palavras-chave
Justiça ambiental. Obrigações vinculantes. Tratado internacional. Responsabilidade corporativa. Direitos humanos.

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1. INTRODUCTION

Extractive transnational corporations (ETC) can cause environmental harm and commit human rights (HHRRs) abuses in developing countries (DC). However, holding them accountable can become a real issue for their victims. There are different cases to reflect on this problem, but the one facing Ecuadorian communities against Chevron Corporation over oil pollution and HHRRs violations it's turning twenty-four years old, bringing us important lessons on corporate impunity. This story is a clear reflection of the struggle required to hold an ETC accountable for wrongdoings in DCs. Therefore, the case against Chevron can be considered as a case study on how to prevent ETC's impunity and bring access to justice for their victims.

During the past 24 years, Ecuadorians had fought their claims against Chevron under many different jurisdictions and at all levels. Starting in the USA (1993), the case was sent back to Ecuador at Chevron's request (2002), just to return to New York two decades later. After losing at all Court levels in Ecuador, Chevron refused to pay and decided to challenge the final judgment as the product of a fraud. Chevron claimed that the Ecuadorian Judiciary System was completely corrupted and initiated a international arbitration claim against the Ecuadorian Government. At the same time, a racketeering civil lawsuit was brought against the Ecuadorians victims (and their representatives), precisely in New York. Meanwhile, the Ecuadorians turned to different jurisdictions: The International Criminal Court—to try to hold accountable Chevron's CEO-; the Argentinian, Brazilian and Canadian courts—looking to enforce their judgment against Chevron's assets, after the company refused to pay and fled Ecuador; and to the Inter-American Human Rights System—seeking to prevent the Ecuadorian Government from interfering with the judicial proceedings.

After reviewing the way this case has developed, it becomes clear that enforcing an international instrument on corporate liability is the best way to address the problem of ETCs causing environmental harm and committing HHRRs abuses in DC. Although there are many initiatives ongoing toward corporate liability, the most suitable way to coordinate different levels of regulations and the variety of stakeholders, is by looking at their efficacy towards enforcement of environmental and human rights obligations – beyond efficacy imposing regulations.

Some stakeholders' efforts opposing this option are very prominent, but those who oppose are the same ones benefiting from the status quo: Social Corporate Responsibility. Thus, we can agree in three things: First, the *regulatory initiative* should drift separate from corporations' pressure. This means that states, international organizations, and civil society should be involved – in a coordinated matter – to hold ETCs accountable. Second, corporate responsibility should be regulated at all levels (national and international), but we find international level to be critical for coordination. And third, durable coalitions support is fundamental to address this super wicked problem. States and civil society organizations concerned with this problem should work as an epistemic community and gather forces for the same policy claim.

2. ETCS DOING BUSINESS IN DCS

Companies from developed countries have succeeded in globalizing their operations, mostly to developing countries. Extractive Transnational Corporations (ETC) are on the top of the list because -among other historical reasons- the resources are frequently allocated in DCs. However,

when operating in these countries, corporations might provoke harm to local people and the environment in which they rely on. Some authors have suggested that "Companies, acting alone or in complicity with states, pose a real threat of violating a wide range of civil, political, social, economic and cultural human rights in diverse ways" (DEVA, 2012, p. 3). Even though environmental and social harm may also occur in the companies' homelands, cases were harm occur elsewhere might be treated and solved very differently.

In 2010, when the British Petroleum (BP) caused the spill in the Mexican Gulf, people -even the White House-[1] rushed to point fingers, and Courts were very efficient to calculate the damage and to condemn the company to pay billions of dollars.[2] This is to not say that in this case the spill problems have been properly addressed (from the social or environmental point of view), but that BP (and others) had no place to run or hide his liability – the judicial system was very effective. However, the story might be different when a disaster occurs in a DC, as happened with Maria Aguinda and other Ecuadorian citizens trying to get Chevron accountable for 24 years. The Aguinda vs. Chevron case led us to think that many years of highly expensive and complex litigation is required, without any warranty of success.

The efforts to regulate ETCs liability are nothing new in history. To the contrary, political struggle has been going on for decades: Corporations enjoy a *weakness bias* constructed since colonial times by developed countries (CASTILLO, 2013, p. 10). However, after independence was achieved by DCs the situation persisted. Moreover, new trade conditions brought international work divisions among exporters and importers, leaving resource extraction to ETCs. (DE RIVERO, 1980, p.1). This bias assumed that, in State-Corporations relationships, corporations were the weak part – and therefore deserve protection (CASTILLO, 2013, p. 11). At the New Economic International Order, developing countries were pushing towards a Code of Conduct for Transnational Corporations, but they failed. In its place, mechanisms to protect international investments were enacted, reinforcing the bias in favor for corporations.

As other authors have pointed out "Globalization of the world economy and trade, especially under the umbrella of the World Trade Organization, has played its part in changing the dynamics of human rights and also posed new challenges for their relations" (DEVA, 2012, p. 3). But it is more appropriate to say that victims of corporate abuses have been left without an appropriated mechanism to address their claims (KENNEDY, 2006, p. 113-114).

2.1 Bias and Limitations

On the one hand, it must be recognized that not all ETCs operating abroad engage in environmental and/or HHRRs violations. But on the other hand, it must be acknowledged that when they do (as in the Chevron case), there are no international legal binding obligations (or forum) to hold them accountable. Their victims (usually disadvantaged people from DCs) are regularly impotent

[1] The White House took a very strong stand on this issue: "So let's be clear about a few things: BP is responsible for -- and will be held accountable for – all of the very significant clean-up and containment costs. They will pay for the mess they've made." See <https://obamawhitehouse.archives.gov/blog/2010/05/04/holding-bp-accountable>.

[2] Kathleen Gould, for instance, has pointed out how serious this case was taken by the judiciary: "This 153-page decision issued by Judge Barbier is an example of proper procedure; all the evidence was presented and investigated and a decision was made that addressed the negligence of the company and sufficiently compensated affected areas." See: Gould, Kathleen, "Oil in Ecuador: The Traps of Transnational Capitalism", *Senior Capstone Projects*, Paper 450, 2015.

against complex corporative legal structures, highly expensive international litigation, secrecy, and inefficient judicial systems. Therefore, beyond recognizing that some corporations might be respectful with HHRRs and the environment, (and that not all victims are powerless), this article starts assuming these conditions as a wicked problem. Consequently, the necessity to address this problem in some way is critical.

3. A PARADIGMATIC CASE

Texaco Petroleum Company (a wholly owned subsidiary of Chevron Corporation)[3] extracted oil from the eastern region of Ecuador. Since 1963 until 1992 Chevron drilled more than 360 oil wells and dogged around 900 pits for toxic waste. More than 400.000 Hectares in two Ecuadorian provinces were affected. These lands were the homeland for seven indigenous nationalities – two of them already disappeared – and for dozens of farmers' communities[4] (CORTE NACIONAL DE JUSTICIA, CASACIÓN, No. 174 2012, February 14th, 2011, p. 147).

Oil extraction operations produced more than 16 billion gallons of produced water, which were disposed into the rivers. Millions of metric tons of natural gas were flared and drilled muds were (and remain) buried into the ground and covered with soil and vegetation. Flora and fauna have been affected by the pollution, causing a great disturbance in traditional cultures way of living (CORTE NACIONAL DE JUSTICIA, CASACIÓN, No. 174-2012, February 14th, 2011).

Ecuadorian affected communities sued Chevron Corporation for environmental damages that polluted more than 400.000 hectares of (once) pristine rainforest. The trial started in 1993, in New York, and took more than 20 years until reaching a final decision by Ecuadorian National Court (the jurisdiction chosen by Chevron). The Ecuadorians were awarded a 9,6 billion dollars' compensation, which are -by court orders- to be invested in restoring the polluted environment and other related damages. (CORTE NACIONAL DE JUSTICIA, CASACIÓN, No. 174-2012, February 14th, 2011).

The judicial case facing Ecuadorian communities against Chevron Corporation over oil pollution and other related damages it's turning twenty-four years old. During this years, Ecuadorians had fought their claims under many different jurisdictions, at all levels. Starting in 1993 in the USA, the case was sent back to Ecuador at Chevron's request (2002),[5] just to return to New York two decades later. After being condemned at all Court levels in Ecuador, Chevron decided to challenge the judgment as the product of a fraud and claimed that the Ecuadorian Judiciary System as completely corrupt.

Chevron promised a "lifetime of appellate and collateral litigation" and vowed to "fight it out until hell freezes over, and then fight it out on the ice."[6] Accordingly the company initiated a

[3] The Federal Trade Commission Consent Agreement allowed the merger of Chevron Corp. and Texaco Inc., in 7 September 2001.

[4] For a copy of the judgment and appeals decisions, in both Spanish and English, as well as an English summary of the judgment's findings, see <http://chevrontoxico.com/news-and-multimedia/2011/0406-key-documents-and-court-filings-from-aguinda-legal-team.html>.

[5] US Court of Appeals Second Circuit, Aguinda v Texaco Inc., 16 August 2002, at: <http://ftp.resource.org/courts.gov/c/F3/303/303.F3d.470.01-7758.01-7756.html>. Access: August 13th, 2011.

[6] Alexander Zaitchik, "Sludge Match: Inside Chevron's $9 Billion Legal Battle With Ecuadorean Villagers, Rolling Stone", *Rolling Stones Magazine*, Aug. 28, 2014, <http://www.rollingstone.com/politics/news/sludge-match-chevron-legal-battle-ecuador-steven-donziger-20140828>. Access: February 25th, 2017.

commercial arbitration case against the Ecuadorian Government, and at the same time, a racketeering civil lawsuit against the Ecuadorians victims. The arbitration was brought under the UNCITRAL rules, claiming that Ecuador was breaching a contract by allowing Ecuadorian citizens to sue Chevron. Meanwhile, a civil fraud case was filed against Ecuadorians plaintiffs in New York, claiming that they were a criminal organization—trying to extort money from Chevron over false environmental liability claims.

The Ecuadorians plaintiffs also did their part to keep the case moving forward. After Chevron refused to pay and fled from Ecuador, the plaintiffs started seeking to enforce the judgment abroad. Chevron's assets in Brazil, Argentina and Canada were targeted for recognition and enforcement of the judgement. Many years and resources have been invested into these proceedings, yet the outcome is still pending in all of them. Complex corporate structures make it very challenging because Chevron (as others ETCs) carries on its business through many layers of subsidiary companies in different countries.

After the arbitration Court issued an interim order commanding the Ecuadorian Government to take any necessary measures to avoid the Ecuadorian case to move forward in Ecuadorian Courts, the plaintiffs sent a petition to the Inter-American Human Rights Commission (IHRC). The plaintiffs wanted the IHRC to intervene in the case Ecuadorian Courts would comply with the arbitration Court's request. The petition was withdrawn because a remarkable decision issued by Ecuadorian Courts made it unnecessary:

> The case in question is not simply about the obligations of the Ecuadorian State under International Law, there is also a potential conflict between supranational norms: on the one hand, the binding force of arbitral awards to the Ecuadorian State (in terms of Investments), and, on the other hand, the effective validity of Human Rights. […] Thus, since Ecuador is a party to [the American Human Rights Convention], and we are faced with a binding and enforceable norm, and recognizing that the arbitration award is based on international norms created for the purpose of protecting investments, we find no justification to make the arbitral award trump our existing human rights obligations. (STATE COURT OF SUCUMBIOS, No. 21 101-201 1-0106, February 17th, 2017 – free translation)

The Ecuadorian plaintiffs also filed a communication at the International Criminal Court, claiming that Chevron's CEO, John Watson, has criminal liability for refusing to comply with court orders to clean up – thereby, forcing Ecuadorians to live in- an oil polluted environment. Despite the evidence on Watson's personal interest and harmful decisions,[7] the Prosecutor refrain from opening an investigation.

4. THE NECESSITY TO ADRESS ENVIRONMENTAL AND HHRRS VIOLATIONS COMMITTED BY ETC

As the problem of ETC crimes is back in the international political agenda,[8] several States and civil organizations are arguing that this issue can be addressed implementing an international binding

[7] Watson is responsible for Chevron acquiring Texaco while the case (and risk) was pending. Any harm to Chevron's shareholders would be his responsibility. According to Chevron's web page: "In 2000, he led the company's integration effort following the Chevron-Texaco merger and then became the corporation's chief financial officer. See: <https://www.chevron.com/about/leadership/john-watson>.

[8] Business & Human Rights Resource Centre, "Binding Treaty", <https://business-humanrights.org/en/binding-treaty>. Access: February 24th, 2017.

regulations to address Environmental and HHRRs violations committed by ETC.[9] Victims from different DCs are gathering together, helping to support this claim with their own experiences. In fact, the need for an international instrument containing binding obligations for transnational corporations has become evident precisely because of cases just like Chevron against Ecuadorians.[10] Ecuador and South Africa proposed a resolution in Geneva, at the 26th session of the UN HHRRs Council. This proposal achieved the creation of a Working Group, but also empowered social organizations and people, all over the globe, to support and influence this process. The initiative is getting much attention, especially since the European Union seems inclined towards this proposal, whit 62 votes in favor, 5 against, and only 1 abstention. (CORRAO, 2016, p.13)

It can be said that this is the point where an epistemic community is gathering forces. Deva has argued that "There is a broad consensus that it is important to agree on the human rights responsibilities of companies at the international level" (DEVA, 2012, p.202). Moreover, it is becoming apparent that there is an agreement among people working on this problem over some of the most urgent threats emerging from this lack of regulation. Lambooy has argued that "Various legal, practical and procedural barriers can prevent effective justice in business-related human rights abuse cases" (LAMBOOY 2011 p.6). Many of them can be identified using the Chevron legal warfare as a case study:

- ETCs operating abroad could deploy obsolete environmental standards and technology, like it happened in Ecuador. Suzana Sawyer has described that Chevron deployed practices that "boosted revenues by the billions" and that "Texaco employed minimal equipment, outmoded technology, and cheap labor" (GOULD, 2015, p. 17). She also remarked that this company "with over fifty years of experience, had control over operations and deliberately used dangerous protocol to cut costs, knowing that in the depths of the Amazon they would get away with it. (SAWYER, 2004, p.100)". As a result, negative environmental externalities that must be avoided are permitted to happen in DCs – while corporation revenue grows in an inversely proportional way.
- Organizational structures are designed to keep liability away from the capital. As Deva has pointed out, ETCs operate today across the globe through a complex web of subsidiaries and affiliate concerns. (DEVA, 2012, p.50). Even if individuals manage to win a litigious case against an ETC, collecting from a corporation may be very difficult due to the corporate veil and complex corporative structures. The Ecuadorian case is the perfect example of this. Indeed, transnational corporations make it very hard to become regulatory targets because "There are no limits on how transnational corporations can structure their operations through a web of parent, subsidiary and affiliate sister concerns" (DEVA, 2012, p.50). Moreover, previous attempts to regulate abroad activities of ETC have already failed in Australia, United Kingdom and United States (DEVA, 2012, p.51). Even after the Ecuadorian plaintiffs

[9]For more information about the efforts of several non-governmental organizations to create a international binding treaty see: <http://www.treatymovement.com>; <https://www.business-humanrights.org/en/binding-treaty>; <http://www.stopcorporateimpunity.org/global-movement-for-a-binding-treaty>; <http://www.foei.org/what-we-do/towards-binding-treaty-transnational-corporations-human-rights>;<https://www.tni.org/en/publication/8-proposals-for-the-binding-treaty-on-transnational-corporations-and-human-rights>.

[10] For information about other cases see: *Trumbo, Sol, Enfrentando los crímenes impunes de las empresas transnacionales*, at <http://blogs.publico.es/dominiopublico/17745/enfrentando-los-crimenes-impunes-de-las-empresas-transnacionales/>.

succeeded seizing Chevron's assets in Argentina at trial level and also on appellate Courts, the decision was reversed by the Supreme Court, arguing that Chevron Argentina is a completely different legal person from Chevron Corporation. (SUPREME COURT OF ARGENTINA, RECURSO DE HECHO, A.523. XLIX, A.238. XLIX, June 4th, 2013). Canadians Courts ruled in a similar manner, rejecting Ecuadorians efforts because a judgement against Chevron Corporation could not be enforced against Chevron Canada.[11] (ONTARIO SUPERIOR COURT DECISION, 2017 ONSC 135, January 20th, 2017).

- ETCs can use the standard defenses regarding a foreign country judgment recognition in order to avoid liability abroad. After the trial is sent abroad (because the ETC claims forum-non-convenience, as Chevron did in NY), the ETC can start tailoring the foreign litigation to satisfy one of the exceptions to avoid its recognition. (WESTON, 2017, p. 736) As a result, "claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim" (TINEKE, 2011, p. 6).
- Citizens from DCs could "experience difficulty in securing legal representation, due to a lack of resources or of other incentives for lawyers to advise claimants in this area" (TINEKE, 2011, p.6). ETCs enjoy virtually unlimited resources for litigation, while their victims, in most cases, can hardly afford a lawyer. This situation may give corporations an incentive to prolong (and multiply) litigations to outsource their adversaries, just as happens with Chevron, who promised "a lifetime of appellate and collateral litigation" and vowed to "fight it out until hell freezes over, and then fight it out on the ice."[12] This consumes the victims' money, but is also highly expensive to judicial systems – taxpayers money wasted in frivolous judicial proceedings. The costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through government support, 'market-based' mechanisms (such as litigation insurance and legal fee structures), or other means. (TINEKE, 2011, p. 6).
- ETCs agreements with governments are often secret or confidential: victims are not allowed to access crucial information to address their claims and prove them to be true. Even their ability to understand the problem is frustrated without the necessary information. For example, the agreement between Chevron and the Argentinian Government (to explore and exploit the Vaca Muerta shale formation in Neuquén) remains secret, even after the Supreme Court ordered to release it.[13] The agreement contains the details about their business and financial structure[14], which is critical information to enforce obligations.

[11] On corporate separateness, Jack Coop, from Fogler Rubinoff, explains that: "The court accepted that, on all the evidence, the two corporations are separate legal entities, and declined to pierce the corporate veil to permit enforcement against the subsidiary. In fact, the court took the unusual step of repeating and adopting all of the findings of fact of the original Superior Court decision that was appealed to the Supreme Court." <http://foglers.com/uploads/press/file/407/Energy_Environmental_Feb8.pdf>. Access: February 10th, 2017.

[12] Alexander Zaitchik, "Sludge Match: Inside Chevron's $9 Billion Legal Battle With Ecuadorean Villagers", *Rolling Stone*, Aug. 28, 2014, <http://www.rollingstone.com/politics/news/sludge-match-chevron-legal-battle-ecuador-steven-donziger-20140828>. Access: February 17th, 2017.

[13] Reuters, "Argentina's Supreme Court orders YPF to disclose Chevron contract", November 10th, 2015, <http://www.reuters.com/article/argentina-ypf-chevron-idUSL1N1351GG20151110>. Access: February 17th, 2017.

[14] The Buenos Aires Herald wrote: "According to sources close to the firm, the "complex structure" of the contract signed with Chevron was aimed at "guaranteeing the flow of investment" from the US company, which was at the time facing a lawsuit in Ecuador. Argentina, meanwhile, was under pressure from both Spain's Repsol — whose shares in YPF were nationalized by the

- Investor-state dispute settlement (ISDS) is available for ETCs and States to solve differences secretly and privately. Victims are not allowed to be a party to these proceedings, and Arbitral orders don't consider HHRRs as part of their binding body of law. Statistically speaking, ISDS resolves seven of each ten cases in favor companies,[15] which could become a way to achieve corporate impunity. According to the company: "Chevron filed the international arbitration claim against the government of Ecuador on September 23, 2009, claiming violations of Ecuador's obligations under the United States-Ecuador Bilateral Investment Treaty, investment agreements, and international law".[16] An interim award ordered that the Government of Ecuador "has to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against the (Chevron) in the Lago Agrio Case". (PCA, Case No. 2009-23, February 27th, 2012). Chevron claimed that the Ecuadorian courts handling the Lago Agrio case had violated Chevron's due process rights because the Lago Agrio litigation had violated the settlement agreement of 1995 between the Ecuadorian government and Texaco.
- After demanding justice from ETCs, victims and their representatives might be targeted with retaliatory and dissuasive tactics. "The use of 'strategic litigation against public participation' (SLAPP) lawsuits silences [Environmental Human Rights Defenders], effectively denying them both their rights to freedom of expression and participation in public affairs. EHRDs require support in their defense against such lawsuits, the financial and psychological burdens of which are often so great that they distract and demobilize defenders".[17] In 2011, Chevron filed a lawsuit under the US Racketeer Influenced and Corrupt Organizations Act against the Ecuadorian plaintiffs, their lawyers and representatives. (SOUTHERN DISTRICT COURT OF NEW YORK, No. 11 civ 0691, February 1st, 2011). The outcome of this case prevent the plaintiffs from trying to enforce their judgment against Chevron in USA. (2nd CIRCUIT, NEW YORK, 833 F.3d 74, 2016).
- In other cases, States and ETCs might share interests, leaving victims without an impartial local jurisdiction to solve their claims. According to Le Billon, "private and public economic and strategic interests are protected by state apparatus (for example, corrupt interests of state officials, protection of multinational corporations, access to strategic commodities such as oil, international political alliances) (LE BILLON, 2003, p. 275). Justice administration in DCs may become biased by these interests, leaving victims without access to justice.

Other issues can be identified beyond these barriers. First, we have the self- regulatory regime of Corporate Social Responsibility, and second, the complexity of having many stakeholders involved.

Cristina Fernández de Kirchner government in 2012 — and the so-called "vulture" funds suing the country in New York." See: <http://buenosairesherald.com/article/221895/ypf%E2%80%99s-chevron-contract-to-be-handed-in-today>.

[15] Acevedo, Jose Manuel, "Arbitros fueron sin decir adiós", *Semana*, February 10, 2017, <http://www.semana.com/opinion/articulo/jose-manuel-acevedo-arbitros-se-fueron-sin-decir-adios/515101>. Access: February 17th, 2017.

[16] Retrieved at: <https://www.chevron.com/stories/international-arbitration-tribunal-finds-chevron-not-liable-for-environmental-claims-in-ecuador>. Access: February, 9th, 2017.

[17] United Nations, "They Spoke Truth To Power And Were Murdered In Cold Blood" (adaptation of the official report A/71/281*), United Nations Special Rapporteur on The Situation Of Human Rights Defenders,* 2016, p. 32, at <https://goo.gl/r8G8Bg>. Access: February 14th, 2017.

4.1 THE SELF-REGULATION FALLACY

The Ruggie's Principles[18] where endorsed by the United Nations Human Rights Council on June 6th, 2011, setting a "new set of global guiding principles for business designed to ensure that companies do not violate human rights in the course of the their transactions and that they provide redress when infringements occur".[19] This is the regime in place, or *status quo* on corporate responsibility on HHRRs. There are many supporters to this, and strongly opposing the work of the intergovernmental United Nations Human Rights Commission work group on a corporate liability binding treaty (UN Resolution A/HRC/RES/26/9).[20] This might be due to failing in recognizing that there is a problem, or misattributing its necessary relevance.

Whichever the cause is, maintaining self-regulatory systems seems to be not enough for victims of corporate abuse. This self-regulatory system has been broadly criticized precisely because of their lack of effectiveness to address the problem of corporate abuse. As stated by Deva, "the existing regulatory initiatives miserably fail to respond to key conceptual (the principle of separate legal personality) and procedural (the doctrine of *forum non conveniens*) hurdles faced by victims in holding companies accountable for human rights abuses". (DEVA, 2012, p.117). The voluntary UN norms fail to "offer any insights on how to overcome the challenges posed by the corporate misuse of the doctrine of *forum non conveniens* and the principle of separate legal personality to delay or avoid their liability for human rights abuses" (DEVA, 2012, p.104). Thus, it's becoming clear that maintaining the *status quo* (meaning that no further action is taken to address the problem) does not very little from ETC's victims point of view.

Therefore, maintaining the status quo is more likely to perpetuate the problems of Environmental and HHRRs violations committed by ETC operating abroad. Precisely, the *status quo* - the self-regulatory approach- is what allows transnational corporations to do business safely – meaning to work worldwide virtually free of any liability. There are thousands of legally binding agreements to protect companies transnational investments,[21] but none to make them accountable for their actions regarding human rights violations abroad. Moreover, corporations rely on very complex legal and financial schemes to keep their assets hidden to their victims – and tax agencies. These are just a few gears for a global system, known and criticized as the *architecture of impunity*, revealing the tendency to shift from "the Ruggie's Peace", or the *status quo* of corporate responsibility (BERRON, 2014, p.125).

[18] The "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", known as Ruggie's Principles, were developed by the Special Representative of the Secretary-General to address human rights and transnational corporations. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4, of 16 June 2011.

[19] See: <http://www.un.org/apps/news/story.asp?NewsID=38742#.WLt3UH_5q-4>. Access: December 15th, 2016.

[20] For more information about United States, European Union and Japan strongly opposing the innititative – and Brazil abstention, see: Trumbo, Sol. Enfrentando los Crímenes Impunes de las Empresas Transnacionales. At: <http://blogs.publico.es/dominiopublico/17745/enfrentando-los-crimenes-impunes-de-las-empresas-transnacionales/>. Access: January 9th, 2017.

[21] The United Nations Conference on Trade and Development HUB web page states that there are 2329 Bilateral Investment Treaties enforced. See: <http://investmentpolicyhub.unctad.org/IIA>. Access: February 18, 2017.

4.2 THE MANY STAKEHOLDERS' PROBLEM

As we just saw, the complex problem of international corporate liability involves many challenges. One of them is the variety and quantity of stakeholders involved: Citizens from developing countries—in many cases indigenous groups-, developing and developed countries, International Organizations, environmental and HHRRs organizations, corporations, scholars, and the international community.

Decades of corporate abuse has led to the creation of an epistemic community claiming the necessity to regulate international corporate liability. In fact, the problem is that there is no central authority capable of regulating the international activities of transnational corporations, nor is one capable of enforcing those regulations. It seems like those causing the problem (corporations and developed countries) are also trying to solve the problem – on their own way: assuming that business needs protection from developing countries and that any regulation should be of voluntary compliance.

5. SETTING THE GOALS FOR A BINDING TREATY

The problem of HHRRs and environmental crimes committed by ETCs in DCs can be seen under different perspectives, depending on what is the goal a legal binding treaty is aiming to reach. To facilitate this analysis, goals can be divided into substantives and instrumental. For this case, substantive goals are consistent with the three pillars of sustainability: environmental, social and economic goals. The instrumental goal is related to efficiency by looking at different costs and revenues. We will analyze each one briefly.

Environmental Goal: Reduce (and prevent) environmental damage caused by ETCs in DCs. - As explained above, ETCs generally deploy different environmental standards and technology when operating abroad. By doing so, corporations obtain higher revenues because their operations costs are reduced. However, this cost reduction is proportionally reflected by negative environmental externalities arising from this way of operating. The first goal would be then to reduce these harmful environmental impacts.

Social Goal: Reduce impacts on HHRRs of local population affected by corporations' activities. - HHRRs are intrinsically related to the environment, especially in developing countries. Developing countries' population often relies heavily on the environment for their own survival. This was the case of Ecuadorian indigenous people affected by Chevron pollution. As a result, if pollution occurs, people's health, dignity and live are affected.

Economic Goal: Reduce economic harm and inequity caused by corporations operating abroad. Negatives externalities caused by corporations operating abroad enhances inequities among nations and people. This inequity harms developing countries' economies but also has effects on the local population because the means to survive frequently depends on a healthy environment. Thus, polluted environments become a barrier to economic development.

Efficiency Goal: Improve cost benefit outcome. -The lack of an international binding norms to address corporate responsibility is highly expensive to many stakeholders. Endless litigation requires many resources, not only from parties involved but from judicial systems. These expenses could be reduced and environmental protection achieved by regulating corporate responsibility. Besides,

higher surplus for a few is not enough to compensate for the burden on society, especially because the surplus and the costs are allocated in different parts of the world.

6. CONSIDERATION OF OTHER OPTIONS

The necessity for and international instrument has already been stated above, but what other options do we have? and more importantly, what should we expect from this legal instrument? In order to corroborate this statement and answer these questions, an evaluation must be conducted, considering the different options, their advantages and disadvantages. From there, we can identify the key conditions which most likely would be helpful into reaching the goals mentioned above.

There are different options to address the problem of corporations and their harmful practices in developing countries. Some organizations are framing this problem as the lack of an international binding treaty to address environmental and HHRRs violations committed by ETCs operating on DCs.[22] Others are advocating to reform the Rome Statute to include ecocide as a crime against humanity - and/or the creation of a specialized chamber at the International Criminal Court.[23] Business enthusiasts, on the other hand, are lobbying to maintain the status quo, arguing that current voluntary regulations are working just fine – for business.[24] Considering all these differences, the options available can be classified as follows: 1.Maintaining the status quo (self-regulation); 2. Achieving implementation of national regulations at multiple States; 3.Creating a set of international binding obligations/rules. 4. A mixture of tools, at local and international level.

6.1 THE STATUS QUO

As stated above, maintaining *the status* quo means that no action is taken to address the problem, and maintaining the architecture of impunity – or the *status quo* of corporate responsibility.

The advantage of maintaining *status quo* is allowing corporations being able to rise their profits while working in developing countries. It could also bring investments to certain parts of the globe because the financial risk of doing business is reduced. The disadvantages of maintaining the status quo are perpetuating or increasing environment and HHRR's violations; but also, this is likely to cause a lack of trust in the judicial systems ability to solve their claims. The problem will not be solved by itself. As the problem grows, it will be impossible to hide it from the public opinion.

Still, this is not a suggestion in the sense that voluntary regulations are to be abandoned. This kind of initiative doesn't harm goals achievement, but keeping it as the *one and only* regulation upon corporations will certainly perpetuate the problem.

6.2 IMPLEMENTATION OF NATIONAL LEGISLATION

States are entitled to legislate locally to prevent the problem of harm caused by transnational corporations in their territories. Every State could enact mandatory regulations for business,

[22] For the efforts regarding this option see: http://www.treatymovement.com/; https://www.business-humanrights.org/en/binding-treaty; http://www.stopcorporateimpunity.org/global-movement-for-a-binding-treaty; http://www.foei.org/what-we-do/towards-binding-treaty-transnational-corporations-human-rights; https://www.tni.org/en/publication/8-proposals-for-the-binding-treaty-on-transnational-corporations-and-human-rights

[23] Further information about this kind of initiatives see: http://stopecocide.nl/en/ and http://eradicatingecocide.com/

[24] For lobbing practices on this matter see: http://www.conectas.org/en/actions/sur-journal/issue/20/1007275-economic-power-democracy-and-human-rights-a-new-international-debate-on-human-rights-and-corporations

including environmental and HHRRs standards for their activities. Depending on their perception of the problem and its urgency, States may face this issue with different approaches. However, to regulate and improve corporate practices, States should legislate at least on the following policy options:

- Corporate veil piercing. The corporate veil is a legal protection that separates corporations' personalities from their subsidiaries and shareholders. This means that they are legally different persons and that one cannot be held liable for the others actions. However, States can legislate and create legal mechanisms to *pierce the corporate veil.* Piercing the corporate veil means rendering it useless to assume legal separateness among different entities, exclusively when it's used to hide assets and/or avoid liability. This is not a proposal to eliminate the corporate veil –it is understandable that it is also a tool to do business safely. The purpose is rather to coordinate the creation of national regulations to avoid corporations from abusing the corporate veil to evade liability. Some States already have provisions regulating this piercing. In most cases, it is required to demonstrate the intention to commit fraud, while in others a strong link among the two entities must be provided.
- Transparency and public access to information. Many States already have regulations to address public disclosure of information, but other States are well known as tax heavens because of their flexibility towards corporative interests and their need for secrecy (BANNON, 2003, p. 49). This option requires States to legislate accordingly to facilitate information disclosure. There are already many ONGs registering this data to the extent that some corporations are voluntarily reporting on "various aspects of their climate change and sustainability profile to one or more NGOs" (RHYNE, 2011, p.52). However, this option goes further, and requires official agencies to participate in date gathering proceedings and to share them globally.
- Environmental and HHRRs standards. Transnational Corporations could be accused of environmental and HHRRs violations. The same capability to enjoy rights through its legal representation also opens the door to binding obligations. States could legislate to have corporations bonded by international HHRRs obligations.

The advantage of implementing national legislation is that corporations would be regulated – at least at the local level. This will help achieve the environmental, social and economic goals in some way. However, efficiency goals won't be achieved because of the lack of coordination among the different states where transnational corporations operate. If a dispute surges, different set of norms will require long and expensive legal procedures to avoid jurisdictional barriers. This means that difficulties coordinating different national regulations into a worldwide system would become a disadvantage.

As for feasibility, we could champion initiatives to regulate corporate power in every country, but instead of having one political problem, we'll be facing many different scenarios with their own complexities. It might be lumpy for some States to work the way into new legislative initiatives. Depending on how close the legal and executive branches are (and other internal political factors), it could result in political and operational implementation barriers.

6.3 Implementation of international binding obligations

A greater level of trust and compromise with the goals stated above, could result on an international instrument approval and ratification. This option would establish binding obligations for corporations at the international level - independently from States enacting local legislation to achieve implementation. For example, this regime could develop as the International Court of Justice (ICJ) which is empower by the States members of United Nations. Acting as a Supranational Institution, the ICJ's actions are not linked or dependent on any particular State, but rely on the Court Statute's authority. There are other examples at the regional level, such as the Inter-American Human Rights Court.

In this sense, an international instrument could include certain parameters to be monitored by the UN to help thrust its enforcement. This option should include:

- The creation of a specialized Court to address environmental and HHRRs crimes committed by transnational corporations. This Court could have the same kind of authority as the International Court of Justice or the International Criminal Court. As a matter of fact, discussions are being held on the issue of whether it should be a new Court, or if a reform to the Rome Statute should allow for the ICC to prosecute transnational corporations' crimes, or at least his executives, who could be held personally accountable for the decisions they make – as long as they result in crimes against the environment and the local people.[25]
- The creation of a specialized institution to provide corporations victims with logistical and legal support to address their claims. This office could also work as an International Registry Office for Transnational Corporation's activities, mapping conflicts worldwide and sharing the information with Governments and victims. An example of this kind of organization could be the World Intellectual Property Organization and the International Patent Office.
- The establishment of an international bond. As shown by USA Environmental Protection Agency and CERCLA, a fund can be implemented to help address environmental problems when responsible parties fail to do so. An international binding Treaty on Corporate Responsibility could establish an international fund to solve corporate crimes. Funds will be provided by States, who are in the best position to recovered those amounts from corporations at their local jurisdictions.
- The establishment of an international certification. Consumers and their preferences play a very important role in these days' market. Corporations committed to HHRRs and high environmental standards can receive a certification to be known by consumers worldwide. Corporations (or entire States) could fail to achieve this certification, facing a competitive disadvantage market wise.

6.4 Mix of national and international options: the most effective International Binding Treaty on corporate liability

This option relies on the previous ones, but recognizes a good probability of enhancing some success by mixing up some options. On the one hand, some national legislation is necessary under any

[25] For further information about these initiatives see: http://stopecocide.nl/en/ and http://eradicatingecocide.com/

approach. Even an International Institution could render useless without the local agencies' cooperation. On the other hand, international jurisdiction and coordination among stakeholders are necessary to avoid creating legal loops. The case between Chevron and Ecuadorian plaintiffs reflects the way corporations enjoy virtually unlimited resources and influence with governments. Under the right approach, an International Jurisdiction might be the only one capable of addressing -fairly- claims against ETCs. Therefore, a mixture of local-level legal implementation and direct international binding obligations has better chances to succeed in achieving the four goals, mainly because of the coordination attained after mixing different options.

- Transparency and public access to information. Information is key to success under any approach. Any court or institution can do little without the necessary data. Many resources are deployed just to access relevant information. As this information is required to address claims efficiently, transparency becomes a prerequisite to doing so. Several reporting venues can be considered: Carbon Disclosure Project, Global Report Initiative, The Corporate Register, and the Climate Register (RHYNE, 2011, p.52).
- A specialized court/institution to address environmental and HHRRs crimes committed by ETCs in DCs. As stated before, ETCs often enjoy high leverage on States decisions, which could cause national jurisdictions to be uncappable of fairly addressing claims against them. Corporations are less likely to influence an independent international institution.
- The creation of a dedicated institution to provide the corporations' victims with logistical and legal support. This tool will be the element that links all the other options. Assistance will provide the victims with the means they need to file their claims in the most efficient manner, helping to achieve the four goals. This international monitoring body, consisting *only* of civil society organizations, will have branches in each state to verify and investigate claims. (DEVA, 2012).

Another critical issue to consider is "the reliance on informal, non-legal tools and non-state institutions to ensure that companies comply with their human rights responsibilities" (DEVA, 2012, p. 200). These institutions, forums, and actors, can help enforce these obligations. Accordingly, this approach can be complemented using international certifications, which depends on NGOs and other organizations pushing forward to its implementation, but also could work under an international office's direction, aiming to push States and corporations to join the stream.

The information available to victims will allow the new regime to operate more efficiently. The victims' concerns could be addressed more effectively by coordinating efforts among national agencies and a specialized international institution dedicated to providing corporations' victims with logistical and legal support to address their claims. And finally, an International Environmental Court will close the cycle of enforcement of these new binding obligations. As the Court is entitled with jurisdictional power, judgments would become binding international commitments. This would help to solve the obstacles in access to justice, described by Deva as "the principle of separate legal personality, the doctrine of *forum non conveniens*, the high cost of litigation, the large number of victims, and judicial delay" (DEVA, 2012, p.216)

The establishment of an international bond could also work as an incentive for States to hold their corporations accountable, but it might also produce resistance to joining the treaty and

compromising any monetary resources. However, a competent Court will render this bond unnecessary because its decisions are more likely to be enforced.

A disadvantage to this options is the necessity to obtain support, not only from as many states as possible, but especially from developed countries – where most corporations (and information) reside. The tools proposed require balanced efforts on the international and different domestic scenarios.

The path dependency theory maintains that the decisions available now are the result of previous choices (LEVIN, CHASORE, 2012, p. 134), The four path model can be used to trigger durable coalitions of support, and could create long-term interests to participants. Locking-in policies could provide incentives for new stakeholders to participate. Therefore, this option aims to shape our future's choices availability in a strategic manner: implementing small changes that become very difficult to reverse (such as statutory provisions regarding human rights and their enforcement); increasing the cost of going back to an irresponsible pattern of operations (because the cost will be palpably higher for developing countries); and, civil society can help to put pressure on governments that are not willing to engage on solutions for corporate irresponsibility. Moreover, shifts in consumers' preferences can send a powerful message to corporations directly.

7. CONCLUSION

This article aimed to approach the problem of ETCs human rights violations in order to find the best mechanism to avoid or solve this issue. The approach came from a global perspective – because this is a global problem. Thus, international law seems to be the best way to tackle the problem from two necessary dimensions: enforcement of international binging obligations and the enactment of local legislation. International public law could require countries to produce legislation complying with international standards.

This analysis is conclusive in supporting an International Binding Treaty as the best way to address the problem of ETCs causing environmental harm and committing HHRRs abuses in DC. Many experts and NGOs are gathering together to push an International Binding Treaty on Corporate Responsibility. Other people are instead occupied towards reforming the Rome Statute and/or including ecocide as a crime against humanity. However, because resources are limited, coordination and focus are needed.

It's acknowledge that international obligations arise from different sources, such as customary international law, transnational institutions, etc. Nevertheless, this paper is focused on obligations arising from International Treaties, as defined by the Vienna Convention on The Law of the Treaties (Article 2(1)(a)): "an international agreement concluded between States in written form and governed by international law."

According to Prof. Ruggie, the design of any system of corporate responsibility should rely on three pillars: "'Protect, Respect, Remedy' to clarify the complementary roles of governments (public actors) and companies (private actors) in respect to the protection and realization of human rights. The first pillar of the framework concerns the State's duty to protect citizens from human rights violations by private actors, such as companies. The second pillar regards the corporate responsibility to respect human rights. The third pillar is about the shared responsibility of States and companies to provide legal and non-legal remedies to victims of corporate (mis)conduct" (TINEKE, 2011, p.1).

This option's efficacy can be measured using Deva's 'twin efficacy' test, which states that regulatory initiatives seeking to impose and enforce HHRRs obligations "can secure their intended effects if they are able to: (a) encourage companies to comply with their human rights responsibilities, and (b) bring to justice those companies that are not so encouraged" (DEVA, 2012, p. 47).

However, Corporate lobby power is well known for being effective. We can expect transnational corporations to use it to try to stop this international regime. As stated above, some States and the business sector are lobbying against a binding international framework. Thus, negotiations will face strong opposition from business representatives. To compensate for business pressure, public opinion and activism are important keys. Strong public support will allow States' officials to resist business pressure – and can also affect business themselves. Therefore, two final recommendations can be made: pushing towards efforts in the same direction, and avoid the negotiations to be captured or coopted by corporate influences.

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